1-1300-15607-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION

In the Matter of the Proposed Permanent Rules Relating to Due Process Hearings for Special Education

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge George A. Beck conducted a hearing regarding the above rules beginning at 12:00 noon on December 16, 2003 in Conference Room 13 and 14 at the Department of Education, 1500 Highway 36 West in Roseville, MN. The hearing reconvened at 7:00 p.m. on the same day and continued until all interested persons had an opportunity to be heard.

The hearing and this report are part of a rulemaking process required by the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The legislature has adopted this process to ensure that state agencies have met all the requirements that Minnesota law sets out for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority and are legal, and that any modifications of the rules made after their initial publication do not result in rules that are substantially different from those originally proposed.

The rulemaking process includes a hearing when the rules are controversial or when an agency receives 25 or more requests for a hearing. The hearing is intended to allow the agency and the Administrative Law Judge (ALJ) reviewing the proposed rules to hear public comments regarding the impact of the proposed rules and when changes might be appropriate. The ALJ is employed by the Office of Administrative Hearings, an agency that is independent of the Department of Education (Department).

The agency panel at the hearing consisted of Amy Roberts, Director of the Division of Special Education, Barb Case, Due Process Supervisor, Jim Mortenson, Hearings Coordinator, and Kristen Schroeder, Rulemaking Coordinator, for the Department. Eight persons attended the hearing and signed the hearing register. Four people spoke at the hearing.

The Administrative Law Judge kept the record open for 20 calendar days after the hearing until January 5, 2004 to allow interested persons and the Department an opportunity to submit written comments. During this initial comment period the ALJ received written comments from the Department and nine public comments. Following the initial comment period the Administrative Procedure Act requires that the hearing record remain open for another five business days to allow interested persons and the agency to respond to any written comments. The agency filed a response, as did the

Minnesota Disability Law Center. The hearing record closed for all purposes on January 12, 2004.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On September 2, 2003 the Department published a Request for Comments on the possible amendment to rules governing Special Education in the State Register at 28 State Register 219. The request solicited comments through October 17, 2003.[2] An errata to the Notice published on October 20, 2003 extended the comment date to November 7, 2003.[3]

2. By a letter dated October 29, 2003 the Department requested that the Office of Administrative Hearings schedule a rule hearing and assign an Administrative Law Judge. The Department also filed a proposed Notice of Hearing, a copy of the Proposed Rules and a draft of its Statement of Need and Reasonableness (SONAR).

3. On October 29, 2003, ALJ George A. Beck approved the Notice of Hearing as well as the additional notice plan received on October 27, 2003. The additional notice plan directed notice to directors of special education, district superintendents, charter school principals, service cooperative units, chairs of the higher education departments, correctional facilities, parent/advocate organizations, the special education interested parties mailing list, education organizations, advocate and attorneys, hearing officers and mediators, stakeholders group members, and persons who submitted comments or requested copies of the proposed Rules.

4. On October 29, 2003 the Department mailed the Notice of Hearing and Proposed Rules to its rulemaking list.[4]

5. On October 29, 2003 the Department mailed a Notice of Hearing and Proposed Rules and the SONAR to the legislators specified in Minn. Stat. § 14.116.[5]

6. On October 27, 2003 the Department mailed the SONAR to the Legislative Reference Library.[6]

7. The Notice of Hearing was published in the State Register on November 10, 2003 at 28 State Register 599.[7]

8. The following documents were placed in the record on the day of the hearing:

A. Request for Comments as published in the State Register

B. Errata-Request for Comments as published in the State Register

C. Proposed rules regarding Special Education

D. Statement of Need and Reasonableness

E. Copy of letter sent to Legislative Reference Library

F. Notice of Hearing as mailed

G. Notice of Hearing as published in the State Register

H. Corrected Notice of Hearing as posted on the Department's website

I. Certificate of sending the Notice and Statement of Need and Reasonableness to legislators

J. Certificate of mailing the Notice of Hearing and the Certificate of Accuracy of the mailing list

K. Certificate of additional notice

L. Comments received

M. 2003 Minnesota Laws, Chapter 9, Article 3, Section 19 (First Special Session)

N. Minn. Stat. § 125A.091.

Nature of the Proposed Rules

9. The proposed rules set out a procedure for special education due process hearings. They implement significant changes made in legislation adopted in 2003, including the deletion of an administrative appellate review in favor of a single state level proceeding.

Statutory Authority

10. The Department cites the 2003 legislation[8] as statutory authority for the proposed rules. That statute provides in part that the Department of Education must:

> Adopt rules that: (1) establish criteria for selecting hearing officers, the standards of conduct to which a hearing officer must adhere, and a process to evaluate the hearing system; (2) ensure that appropriately trained and knowledgeable persons conduct due process hearing in compliance with federal law; and (3) create standards for expedited due process hearings under federal law.[9]

The Department also cites Minn. Stat. § 125A.07(b)(3) that requires it to have rules that result in "reduced inequalities and conflict, appropriate due process hearing procedures and reduced court actions related to the delivery of special education instruction and services for students with disabilities…". The Department has established its general statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

11. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness.[10] The Department has discussed each factor in its SONAR. The Department estimates a savings of public funds of approximately $562,500 as a result of the statutory changes and proposed rule amendments. These savings result from abolishment of the administrative appeal in due process hearings, more authority for hearing officers to control the proceedings, and an increase in federal Special Education funds available due to the removal of the administrative appeal.[11] The Department also notes that because there are no specific federal regulations for a due process hearing system and there are no differences between the proposed rules and existing federal regulations.[12] The Department has satisfied the requirements of Minn. Stat. § 14.131 which requires it to ascertain the regulatory analysis information to the extent the Department can do so through reasonable effort.

Performance Based Rules

12. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems.[13] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[14] In its SONAR the Department states that it made every attempt to develop rules that will ensure the due process hearings are conducted effectively and efficiently while achieving the best possible results for children and youth with disabilities. It also states that it has attempted to make the rules clear in purpose and intent, flexible, and not overly prescriptive.[15]

Stakeholders' Group

13. The Department convened a stakeholders' group to consider proposed rules for Special Education due process hearings. In its SONAR the Department stated as follows:

> These proposed rules are largely a product of a public stakeholders' group that met frequently between May 31, 2002 and January 23, 2003. The group proposed drafts of the state statute

> governing due process hearings and these proposed rules and intended for the two documents to complement one another. The group operated by consensus. If any person of the group affirmatively objected to any matter it did not become part of the recommendation. The department subsequently reviewed the draft rules and made some edits for this proposal.[16]

The stakeholders' group included 11 members representing different organizations and included Luther Granquist, Esq. of the Minnesota Disability Law Center and Bob Brick representing ARC of Minnesota and PACER.

14. At the rulemaking hearing Mr. Granquist and Mr. Brick denied that the stakeholders' group came to a consensus on the proposed rules. They also stated that the Department had made changes to the proposed rules subsequent to the review of the rules by the stakeholders' group. In post hearing written comments, Mr. Granquist stated that the proposed rules were not approved, formally or otherwise, by the group and argued that the actions of the stakeholders group provided no support for the need or the reasonableness of the proposed rules.[17] The Minnesota Administrators for Special Education (MASE) had two members in the stakeholders' group. It commented that the group did not arrive at a consensus on the proposed rules and that the rules reflect the work of MDE staff.[18] Mr. Granquist suggested that the proposed rules be withdrawn and redrafted due to a number of problems and the need for review by stakeholders.[19]

Rulemaking Legal Standards

15. Under Minn. Stat. § 14.14, subd. 2 and Minn. Rule 1400.2100, in a rulemaking proceeding, the Administrative Law Judge must determine whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[20] The Department prepared a Statement of Need and Reasonableness in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by exhibits and comments made by agency representatives at the public hearing and in written post-hearing submissions.

16. The question of whether a rule is reasonable focuses on whether it has a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[21] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[22] A rule is generally found to be reasonable if it is rationally related to the end sought by the governing statute.[23]

17. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the

evidence connects rationally with the agency's choice of action to be taken."[24] An agency is entitled to make choices between possible approaches as long as the choice made is rational. It is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question considered by the ALJ is rather whether the choice is made by the agency is one that a rational person could have made.[25] The agency may, of course, consider whether another approach is appropriate. Any rules not discussed are found to have been shown to be needed and reasonable.

18. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[26]

19. In this matter, the Department has proposed some changes to the rule language after publication in the State Register. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.[27]

20. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced … in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the … notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of the rulemaking proceeding could be the rule in question."

21. In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding … could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the … notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the … notice of hearing."[28]

22. Any substantive language that differs from the rule as published in the State Register has been assessed to determine whether the language is substantially different. Because some of the changes are not controversial, not all of the modified language has been discussed. Any change not discussed is found to be not substantially different from the rule as published in the *State Register*.

23. This report is limited to discussion of the portions of the proposed rules that received comment or otherwise needed to be examined. All of the public comments were fully considered. A detailed discussion of the proposed rules is

unnecessary when the proposed rules are adequately supported by the SONAR or the Department's oral or written comments, and there is no public opposition. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute, and there are no other problems that would prevent the adoption of the rules.

3525.0210 – Definitions

24. **Subpart 4** defines "alternative dispute resolution" as any process used to resolve a special education dispute which is not a due process hearing or a state complaint. The Rider Bennett special education attorneys and the Minnesota Association of Special Educators (MASE) thought this definition was too broad, that it might include an IEP meeting and suggested that it be limited to mediation.[29] The Department responded that since an IEP meeting is specifically defined in law the definition does not infringe upon it and the Department seeks to create a broad definition to expand the options for settlement in Minnesota. The definition is needed and reasonable as proposed. It is recommended however that the Department insert the word "voluntary" before the word "process" so as to exclude non-voluntary forms of ADR such as binding arbitration.

25. **Subpart 8** defines "conciliation conference**."** The Minnesota Disability Law Center (MDLC) by Mr. Granquist pointed out that a conciliation conference does not always follow an IEP meeting.[30] Rider Bennett felt that the definition was unnecessary since it is defined in statute. The Department agreed to modify the proposed definition by deleting the words "which follows an IEP team meeting." Although the conciliation conference is described in the statute it is not unreasonable to define it in rule particularly for the benefit of parties without attorneys. As modified the definition is needed and reasonable. The change is not substantial.

26. **Subpart 15** defines "district." Rider Bennett and MASE suggested eliminating the definition. Attorney Peter Martin suggested using "LEA" instead.[31] The Department states that the definition is consistent with federal law understandable for the non-attorney reader and provides an exhaustive list of entities under the Department's jurisdiction. The definition is needed and reasonable as proposed. It is reasonable to have a definition applicable to this particular set of rules to assist the reader's understanding of how the rules are applied.

27. **Subpart 16** defines "due process hearing." Mr. Martin saw the definition as unnecessary. The Department sees the definition as important for non-attorney readers in that it excludes disciplinary hearings, Section 504 hearings and FERPA hearings, for example. The definition is needed and reasonable.

28. **Subpart 20** defines "facilitated IEP meeting." Rider Bennett suggested that the definition be eliminated since it was in statute. MDLC suggested a rewriting of the definition to clarify the responsibility of the facilitator. The Department accepted that suggestion and as modified the definition will read:

> "Facilitated IEP Meeting" means an IEP/IFSP/IIIP meeting moderated by an impartial state-provided facilitator to promote effective communication, to address conflicts as they arise, and to assist a team in developing an IEP/IFSP/IIIP."

Again, the definition is added to bring relevant provisions into one place for ease of use, especially by a non-attorney. As modified the definition is needed and reasonable, and the modification is not substantial.

29. **Subpart 21** defines "filing or file." Mr. Martin questioned what constituted actual receipt and what constituted licensing of a mail service. Rider Bennett saw the rule as unnecessary and questioned why the 4:30 p.m. deadline was included in the rule. The Department responded that the language was borrowed from the rules of the Office of Administrative Hearings. The Department does not believe that the term "Licensed Carrier" will cause much dispute given the number of options for service. It notes that state offices typically close at 4:30 p.m. The definition is needed and reasonable as proposed. It is reasonable to establish a specific uniform time in the rule for receipt of documents.

30. **Subpart 31** defines "mediation." Rider Bennett said that the rule definition was not needed since it was in statute. Mr. Martin questioned what would happen if a Department was a mediation party. The Department noted that it has never been a party to a state mediation but that if this happened it would employ the services of an outside mediation service. The definition is needed and reasonable as proposed. The unusual possibility that the Department could be a party does not warrant treatment in the definition and the definition is needed to assist a non-attorney.

31. **Subpart 34** defines "Parent." Rider Bennett suggested eliminating the definition since it is defined elsewhere and Mr. Martin suggested including a stepparent or grandparent within the definition. The Department decided to modify the definition to be more comprehensive and consistent with federal law. As modified the definition will state:

> "Parent" means:
>
> A. a natural or adoptive parent of a child;
>
> B. a guardian but not the state if the child is a ward of the state;
>
> C. a person acting in the place of a parent (such as a grandparent of step-parent with whom the child lives, or a person who is legally responsible for the child's welfare);
>
> D. a surrogate parent who has been appointed by the district; or
>
> E. a foster parent if:

(1) the natural parents authority to make educational decisions on the child's behalf has been extinguished under state law;

(2) the foster parent has an ongoing, long-term parental relationship with the child;

(3) the foster parent is willing to make the educational decisions required of parents under the Individuals with Disabilities Act; and

(4) the foster parent has no interest that would conflict with the interests of the child.

The modification addresses Mr. Martin's concerns, is not a substantially different rule, and as modified is needed and reasonable.

32. **Subpart 40** defines "service or serve**."** Rider Bennett and MASE saw this definition as unnecessary and MDLC suggested allowing e-mail. Mr. Martin and MDLC noted that service by mail being complete three days after the date mailed may cause problems. The Department responded that e-mail may contain unforeseen consequences in terms of proving receipt or delivery, and it would like to study this further. The Department states that having service complete three days after an item is mailed creates an easily understood rule applicable to all regardless of whether actual receipt occurs earlier. The Department believes that including three days for mailing within a due process timeline is not an undue burden. The definition is needed and reasonable as proposed.

3525.3600-Prior Written Notice**.**

33. The Rider Bennett firm saw this rule as unneeded since it is in the statute and in the regulations. MASE supported the inclusion of the rule. The Department responded that the rule is included for ease of use. The first paragraph of the rule requires service of the written prior notice when a district proposes or refuses to change an educational placement. MDLC suggested use of the work "provide" rather than "serve." The Department seeks to make use of its defined term "service" since receipt of the notice is critical. MDLC also questioned whether a written request was required. The Department replied that the rule does not require a written request nor does federal law.

34. **Item A** requires notice to the parents that the district will not proceed with initial placement without prior written consent of the parents. Mr. Martin saw this as contrary to state law which he believes is silent on the issue. The Department replied that under a federal interpretation a district cannot proceed with initial placement without the parents' consent. MDLC argued that an Item C should be added to the notice requirements that advises parents of their right to request a conciliation conference. The Department agreed and suggested addition of the following:

> C.inform the parents that if they refused to provide prior written consent for initial evaluation or initial placement or object in writing to any proposal, or if the district refuses to initiate or change the identification, evaluation, or educational placement or the provision of a free appropriate public education to the pupil, the parent may request a conciliation conference.

35. Mr. Martin commented on the last paragraph of the rule and suggested it was ambiguous in that it did not state whether it was talking about the old IEP or the proposed IEP. The Rider Bennett firm suggested that only significant changes to the IEP should trigger this provision. The Department responded by inserting the word "proposed" before "individual educational program plan" and inserting the word "initiate or" before "change." It also noted that a change in IEP content need not be termed significant in order to trigger this requirement under federal law.

36. As modified the proposed rule has been shown to be needed and reasonable. The modifications do not constitute substantial changes.

3525.3700 – Conciliation Conference.

37. **Subpart 1a** sets out the requirements for a conciliation conference. MDLC suggested that this subpart contain the minimum number of persons for the conference as set out in the definition section. The Department replied that it believes the statement of the number of participants is appropriate to the definition section. Although this determination by the Department is not arbitrary, adding the definition to the substantive rule would make it more useful for readers.

38. **Subpart 1a.A** as proposed requires the conference to be held within 10 calendar days from the district's receipt of the parents' agreement to participate. Rider Bennett commented that the time limit should be 10 school days or a reasonable time. The Department pointed out that the use of school days would not require a conference during the summer and suggests that 10 calendar days is a reasonable length of time. MDLC pointed out that the conference must be held within 10 days of the "request" as well as within 10 days of the "agreement" if the school district suggests conciliation. The Department agreed to rewrite the sentence to state that:

> A conciliation conference must be held within 10 calendar days from the district's receipt of the parent's agreement or request to participate in a conciliation conference and at a time and place mutually convenient to the parent and school district representatives.

39. **Subpart 1a.C** provides that discussion during a conciliation conference is confidential and must not be "permitted"[32] as evidence in a due process hearing. PACER and MDLC argued that a request by a parent for a specific service during a conciliation conference should be admissible.[33] The Department agreed to modify the provision as follows:

> Statements made during a conciliation conference must remain confidential and shall not be permitted in evidence in a due process hearing except as provided in Item D and except to allow a party to establish at a due process hearing that a particular service or action was requested or offered.

40. **Subpart 1a.D** provides that the district must serve a parent with a written memorandum and proposed IEP within five business days after the final conciliation conference. The Department agreed to accept a suggestion by Rider Bennett that replaces "the following" with "resulting from" in the rule.

41. **Subpart 1a.E** provides that except for the initial evaluation or placement the district must proceed within 10 business days after the memorandum is served on the parents unless the parent objects in writing. The Department agreed to adopt a suggestion that the District must proceed 10 business days after the memorandum is served rather than "within" 10 business days.[34] MDLC suggested that 14 calendar days was more appropriate than 10 business days and suggested that "must" be replaced with "may" so that a district is not required to proceed. The Department commented that the appropriate procedure is for the IEP team to reconvene and determine a different course of action if a district decides not to proceed. Subpart 2 is, as modified, needed and reasonable. The changes are not substantial.[35]

42. **Subpart 3** requires a district to inform the parent of the procedure for requesting a hearing and other procedural safeguards when it is notified that the parent intends to go to an impartial due process hearing. Mr. Martin commented that the state should be responsible for providing this notice. The Department replied that the district is still responsible for providing a free appropriate public education that that the district is the entity that knows about the dispute at this point in the process. The subpart is needed and reasonable as proposed.

3515.3750 – Mediation and Other Alternative Dispute Resolution.

43. The Department accepted several suggestions to modify this rule by Mr. Martin and MDLC to make it clear that districts are not required to make other forms of ADR available and that alternative dispute resolution does not include conciliation. As modified the first sentence reads, in part, that "districts must make mediation available. Districts must also inform parents of other forms of alternative dispute resolution to encourage resolution of disputes…" The second sentence is modified to state that: "Mediations and other forms of alternative dispute resolution, except for conciliation, are voluntary for both parties." So modified the rule is needed and reasonable.

3525.3790 – Time Computation.

44. Rider Bennett argued that this rule was not needed and was too technical. The Department pointed out that problems persist with respect to timely and appropriate filing and service of documents. The rule is needed to assist attorneys and non-attorneys in understanding how time will be computed so that they will not be

sidetracked into technical matters and can focus on the substance of the dispute. The rule has been shown to be needed and reasonable as proposed.

3525.3900 – Initiating a Due Process Hearing.

45. **Subpart 1** requires the school district receiving a request for a hearing to immediately file the request with the Department and in no case more than two business days following receipt of the request. If the Department receives the request it must notify the district within two business days. Mr. Martin, Rider Bennett and MASE pointed out that the statute says *immediately* rather than "two business days." MDLC suggested changing it to "next business day." The Department responded that the rule interprets the application of "immediately" and stated that the "next business day" time period was impractical since a district administrator may be unavailable. It also stated that it is unreasonable to expect the Department to act more quickly than two business days with regard to every request. MDLC, MASE and Rider Bennett all agreed that the notice to the parent should be served by the Department rather than the individual school district.

46. Subpart 1 has been shown to be needed and reasonable as proposed. The Department appropriately interprets the word "immediately" so that a definite deadline is established for the school district and the Department. Although two business days cannot be said to be arbitrary a "next business day" requirement would seem to be workable. Additionally, it is recommended that the requirement that the Department notify the district of the request state that the Department must notify the district "immediately and in no case more than two business days" of the request.[36] The Department would clearly be in a better position to implement a "next business day" notification to the district. Such a requirement would be consistent with the Department's interest in the prompt disposition of disputes. Finally, since the statutory changes create a state rather than a local hearing procedure the Department should consider whether it should issue the notice to the parent.

47. **Subpart 2** sets out the requirements for a request for hearing from a parent. Mr. Martin questioned whether subpart 2f that requires a description of the problem about providing special education services would include eligibility. The Department believes that an eligibility dispute is about whether the district should be providing services as opposed to what kind of services and therefore "services" includes eligibility. It does propose to modify language by replacing "providing" with "the provision of" special education services. As modified Subpart 2 is needed and reasonable.

48. **Subpart 3** requires the district to serve a written notice of hearing and sets out its content. Mr. Martin saw the subpart as essentially additions to IDEA and burdensome and suggested that the state serve the written notice of hearing rather than the district. MDLC did not see a need to send the IEP or the prior written notice to the Department. In its post-hearing comments the Department stated that as the providing entity the district is aware of the dispute and is the proper entity for ensuring parents receive a copy of this notice. The subpart has been shown to be needed and

reasonable as proposed. The Department could consider whether it needs to receive the items set out at Subpart 3 H and I.

49. **Subpart 4** is a statement of the basic procedures and safeguards that must be provided to the parents. The Department proposes to add the word notice to the heading of Subpart 4 to clarify its contents. MDLC suggested that this subpart be simplified by simply referencing the appropriate parts of the CFR. The Department responded that it seeks to provide the necessary information in one place without reference to other laws.[37]

50. **Subpart 4C** indicates that the hearing must be held within 30 calendar days from the date of the request. MDLC noted this did not recognize the possibility of an extension. Mr. Martin asked whether this appropriately recognized the requirements of expedited hearings. The Department agreed to add the phrase "with the exception of an expedited hearing" to the second sentence. But it declined to acknowledge the possibility of an extension in this item since it is not intended to be an exhaustive list of all requirements. Subpart 4C is needed and reasonable as modified.

51. **Subpart 4E** requires a hearing officer to prohibit evidence not disclosed five business days before the hearing, including evaluations. Mr. Martin felt that the rule inappropriately limited the discretion of the hearing officer and MDLC argued that exceptions should be allowed and that admission of evidence for impeachment should be acknowledged in the rule. Mr. Martin's assertion would appear to be suggested by the language of 34 CFR § 300.509(b)(2). The Department noted that this item is a notice provision and is not meant to be a rule of evidence. It merely announces to the parties the basic five-day rule. Subpart 4E is needed and reasonable as proposed.

52. **Subpart 4F** requires a statement that the burden of proof is on the district to show that the proposed action is justified and that it "is in compliance with the law." Three commenters saw the quoted language as vague and questioned what law was being referenced. The Department agreed to delete this language and to combine it with Subpart 4J, which was criticized on the grounds that it misstated the rule for private school tuition and sounded as though the parent had the burden of proof to show that the district had failed to provide a free appropriate public education. As modified Item J reads as follows:

> A statement that the burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. If the district has not offered or provided a free appropriate public education in the least restrictive environment and the parent wants the district to pay for a private placement, the burden of proof is on the parent to demonstrate, by a preponderance of the evidence, that the private placement is appropriate.

The modification addresses the concerns of the commenters and so modified Subpart 4F as needed and reasonable. The change is not substantial.

53. The MDLC noted that the 45-day deadline for a decision in **Item G** did not recognize the possibility of an extension. The Department earlier indicated that it intended to state the general rule even though an extension was possible. The Department did modify the item to acknowledge expedited hearings by adding the phrase "with the exception of an expedited hearing for which a decision must be rendered within 10 days" in the first line of Item G. So modified it is needed and reasonable.

54. Mr. Martin criticized **Item H** on the grounds that the Department cannot write a rule for a federal court and because he believes only an "aggrieved party" can appeal. MDLC also agreed that the Department had no authority to write rules for a federal court. The Department agreed to rewrite the item so that no appeal deadline as set for the federal court. It now reads:

> a statement that the parent or district may appeal a decision of the hearing officer to the Minnesota Court of Appeals within 60 calendar days of receipt of the decision or to the United States District Court for the District of Minnesota.

The Department noted however that the requirement of a party being "aggrieved" does not reflect the law as stated at Minn. Stat. § 125A.091, subd. 24. As modified the item has been shown to be needed and reasonable. It is not a substantial change.

55. **Item I** requires a brief statement of the stay put rule. MDLC saw it as inadequate. The Department replied that it sought to keep the statement uncomplicated and not overly technical. The item is needed and reasonable as proposed.

56. **Item L** requires a statement that the Department will provide the parents with a written verbatim record of the hearing at no cost. Rider Bennett, said that the district should receive a transcript also. The Department replied that federal law only requires the parents to receive a free verbatim record and that state law only requires the state to pay for the recording and preservation of hearings. Minn. Stat. § 125A.091, subd. 12. The item is consistent with law and is not arbitrary, however the Department could decide that the parties could be treated the same in respect to availability of a transcript.

57. **Item M** provides notice that parents prevailing at a hearing may be entitled to reasonable attorney's fees. Mr. Martin and Rider Bennett saw this notice as unnecessary and Mr. Martin questioned whether or not attorneys fees were also available in the state court. The Department agreed to delete the words "federal district" from the rule. So modified the item is needed and reasonable. It is reasonable to assume that parents may not be familiar with the law as stated in IDEA and would benefit from this proposed language.

58. **Item N** provides notice that the hearing officer may apply a statute of limitations. PACER noted that the legislature did not set a statute of limitations and suggested this provision be deleted or that a specific period be set. MDLC also urged that a specific number of years be specified in the rule. Mr. Martin suggested that notice be provided that the hearing officer might limit issues as well as relief. The Department responded that this is a notice provision not a substantive rule. The Department accurately notes that it does not have the statutory authority to establish a statute of limitations, but that courts have approved hearing officers establishing statutes of limitation on a case-by-case basis. The item is needed and reasonable as proposed. It is reasonable for parties to receive notice that a statute of limitations may be applied.

3525.4010 – Hearing Officers

59. **Subpart 1A** requires five years of experience practicing law and a current license to serve as a hearing officer. It also allows an exception for a hearing officer with five years of experience in special education. There was general support for the use of attorneys as hearing officers. However, PACER supported deleting the exception for non-attorneys with five years of experience. In response the Department decided to delete the phrase "for at least five years experience as a special education due process hearing officer." So modified the item is needed and reasonable. It is not substantially different since those concerned should have understood that there interests could be affected and since it is a logical outgrowth of the proposed rule.[38]

60. **Subpart 1B** requires a hearing officer to have litigation experience and an understanding of administrative law. Rider Bennett and MDLC saw this as vague and asked who would determine whether this criteria is met. The Department replied that the requirement sets a minimum standard and that beyond this the Department will exercise its discretion. The item has been shown to be needed and reasonable. Requiring specific litigation experience or a specific understanding of administrative law would not be feasible. But the provision provides an important guideline for the Department.

61. **Subpart 1C** requires hearing officers to swear on oath to support the Constitutions of the U.S. and Minnesota, to adhere to the professionalism aspirations and to uphold the laws of the federal government and the State of Minnesota. The Department has not demonstrated the need for this item, especially with the deletion of the grandfather clause for non-attorney hearing officers. Licensed attorneys already swear an oath to support the Constitutions of the United States and the State of Minnesota and are expected to uphold federal and state law. There is no apparent or demonstrated need to have hearing officers a separate oath for special education due process hearings. The reference to adhering to standards of conduct in Subpart 2 is unnecessary since Subpart 2 creates the expectation that those standards will be followed. The language in Subpart 1C also conflicts with Subpart 2 since it appears to *require* adherence while Subpart 2 does not. And in fact, the professionalism aspirations themselves are not rules of conduct for judges or attorneys but rather aspirations. The Department has failed to explain on what evidence it is relying and

how it connects rationally with the proposed rule.[39] To correct this defect, the item must be deleted Additionally, the Department may want to consider referencing the professionalism aspirations as they apply to lawyers appearing in these proceedings, by including a provision in Rule 3525.4300 on hearing procedures. The Department is responsible for the hearing process and may adopt rules creating expectations for attorneys appearing in those hearings.

62. **Subpart 2** states that "impartial" hearing officers are expected to follow the professionalism aspirations. Mr. Martin suggested deleting the word "impartial." The Department stated that the terms derived from the federal regulation. While the rule as proposed is not arbitrary, it is recommended that the word be deleted. It is awkward and might lead one to believe that only impartial hearing officers are expected to follow the aspirations. The Department is not required to repeat the federal language. The subpart is needed and reasonable.

63. **Subpart 3** authorized collection of data on the hearing system. Two commenters thought the subpart was misplaced and one thought it was unnecessary. The Department saw the evaluation as relating primarily to the hearing officer. The Department has discretion to include the subpart where it believes it is appropriate to do so. It is needed and reasonable.

64. Three commenters, MDLC, PACER and the Ombudsman for Mental Health argued that the rules should require the use of Administrative Law Judges from the Office of Administrative Hearings for all due process hearings. PACER and the Ombudsman suggested that the Department influences hearing officers during its training. The Department replied that it intends to continue contracting with the Office of Administrative Hearings but also will select hearing officers not associated with OAH in order to retain flexibility and ensure timelines are met. It believes an extended roster is necessary to ensure that caseloads are manageable and timelines met. It believes there is no data to support the idea that any particular group of hearing officers are more or less fair, or have an economic interest in prolonging a hearing.

65. There is nothing in the record to indicate that OAH would not have sufficient judge time available for special education hearings. However, the Department's use of its own hearing officers does not amount to a violation of constitutional due process, even though use of professional hearing officers independent of the Department would provide at least the appearance of a more fair and impartial hearing system.[40] The Department should carefully consider and act upon the belief of participants in the process that it inappropriately influences hearing officers during their training and that its hearing officers are less than impartial.

3525.4110 – Prehearing Conference.

66. **Subpart 1** requires a prehearing conference within five business days and requires the hearing officer to prepare a written verbatim record which must be available to both parties. A parent commented that five business days was not sufficient time to prepare. Mr. Martin suggested not requiring a written record. The Department pointed

out that both of these requirements are contained in the statute. The subpart is needed and reasonable as proposed.

67. **Subpart 2A(2)** directs the hearing officer to ensure access to records and the sharing of information between parties. Mr. Martin commented that this sounds like discovery can be ordered and suggested that the hearing officer did not need copies of information until the hearing. The Department indicated that it intended to assist the non-attorney in the hearing process and allow the hearing officer to establish management and control of the hearing. The provision is needed and reasonable. It does not authorize discovery requests by either party.

68. **Subpart 2A(3)** allows the joinder of other educational agencies. Commenters complained that "educational agencies" was not defined and that "agencies" might imply non-educational agencies. In response the Department will change "education agency" to "district." As modified the provision is needed and reasonable. It is not a substantial change.

69. **Subpart 2A(5)** requires the hearing officer to assist the parties in establishing a list of evidence[41] and witnesses among other things. Rider Bennett and MASE commented that use of the word "assisting" should be deleted so that the hearing officer remained impartial. The Department disagreed and indicated that the provision assists non-attorneys by creating a tool for hearing officers to manage the hearing process. The provision is needed and reasonable as proposed. Assisting an unrepresented party in this manner can be done impartially.

70. **Subpart 2B** directs the hearing officer to identify the issues for hearing.[42] Mr. Martin, Rider Bennett and MDLC all found the attempted definition of "issue" to be confusing and in response the Department agreed to delete sub-items (1) and (2). Rider Bennett again objected to the phrases "assist" and "resolve the dispute" as not being within the proper role of the hearing officer. As modified the item is needed and reasonable. It is not substantially different from the item as proposed.

71. **Subpart 2C** discusses a scheduling order and also authorizes the hearing officer to require an independent educational evaluation at district expense. Rider Bennett did not believe that this could be ordered prior to hearing and the MDLC thought it was important enough to be a separate item. The Department pointed out that under Minn. Stat. § 125A.091, subd. 18(b)(6) hearing officers have the authority to order an independent education evaluation at the district's expense. Although the provision is contained in a section on establishing and maintaining control of the hearing, the overall subdivision deals with hearing officer authority and it seems clear that an evaluation may need to be ordered before the hearing in order to be an effective part of the hearing process. The item is needed and reasonable.

72. **Subpart 2D** authorizes disposition of a case by summary judgment. Mr. Martin suggested that partial summary judgment be explicitly allowed and Rider Bennett suggested that "facilitation" of a settlement does not promote hearing officer neutrality. PACER and the MDLC strongly urge deletion of this item on the grounds that it would

be unfair to parents who would be at a disadvantage in preparing or responding to motions and unable to cross-examine witnesses who testify in affidavit. MDLC proposed that the hearing officer be authorized to rule on all or a portion of the issues as a matter of law but only if the parties stipulate to material facts or if the hearing officer determines there are no more material facts in dispute. The Department decided that the modified language should read as follows:

> The hearing officer must determine if the hearing may be disposed of without an evidentiary hearing and set the schedule and procedure accordingly. The hearing officer may dispose of any issue without an evidentiary hearing if there are no material facts in dispute. The hearing officer may facilitate a settlement, if possible, including suggesting the parties participate in mediation or other alternative dispute resolution option.

In response to this modification MDLC stated that it agreed with the deletion of the phrase "summary judgment" but believes the modification will still lead to an affidavit practice prejudicial to parents. As modified the item is needed and reasonable and the change is not substantial. The deletion of the legal term "summary judgment" suggests that the legalistic procedure associated with that process need not be observed to implement this item. Although a summary judgment procedure can be difficult for an unrepresented party, it is within the sound discretion of the hearing officer as to whether this procedure is employed for one or more issues in a case. The hearing officer must ensure fairness for both parties in the conduct of a proceeding and not employ a procedural device to the disadvantage of a party. This rule may be particularly helpful in narrowing the issues for hearing. It is needed and reasonable as modified. The change is not substantial.

73. **Subpart 3** authorizes the hearing officer to ensure "compliance with all requirements." Mr. Martin and MDLC commented that this phrase is vague and too broad. The Department replied that it means that hearing officers have authority to control the hearing and ensure that parties are complying with all applicable laws. The phrase is not unconstitutionally vague or arbitrary. However the Department may want to indicate that it means "requirements of law" in order to clarify the provision.

74. **Subpart 4** authorizes subpoenas and indicates that the subpoena must include a statement "that the parties have the right, pursuant to federal law, to confront, cross examine, and compel the attendance of witnesses in a special education due process hearing." Mr. Martin commented that this requirement appears to be addressed to parties rather than subpoenaed witnesses and the MDLC suggested that it had not been shown to be needed and reasonable and should be deleted. The Department replied that the statement is included to inform the witness of the purpose for which they are being called. Although the Department has presented a rationale for the sentence in question, it is recommended that it be rephrased as follows: " A subpoena must include a statement that federal law gives parties to a special education due process hearing the right to compel the attendance of witnesses." This modification would satisfy the Department's intent in a less confusing manner. Rider Bennett also

objected to authorizing the hearing officer to refuse to issue a subpoena. The Department feels that the parties may abuse the subpoena process without a preliminary determination by the hearing officer. Such a determination is common in administrative cases, especially where unrepresented parties may appear. The subpart is needed and reasonable. The Department may wish to consider whether a hearing officer can make a decision on relevancy without some information from a party as to potential relevance of testimony. See Minn. Rule pt. 1400.7000, subp. 1.

3525.4220 - Hearing Rights of Respective Parties.

75. The Ombudsman for Mental Health and MDLC urged that a provision be added to Subpart 1 setting out the right to an interpreter at district or state expense. The Department replied that various anti-discrimination statutes already speak to this requirement. Although the rule may not be arbitrary without such a provision, it is recommended that the Department modify the rule to state the basic hearing right to an interpreter at state expense. As the Department has indicated in response to comments on other parts of the rule, its objective is to clarify the procedures for all parties especially the non-attorney. A party may be completely unaware of this right. Rider Bennett commented that both parties should receive a free copy of the hearing transcript. The Department again pointed out that federal law only requires that parents receive a verbatim record of the hearing at no cost. Mr. Martin commented that Item Subpart 1C appears to deny hearing officer discretion in making a decision on introduction of evidence which has not been disclosed five business days before the hearing. It is recommended that the word "prohibit" be replaced with "object to" to more properly reflect the rights of the parties. It is recommended that the Department adopt this suggestion. The rule has been shown to be needed and reasonable as proposed.

3525.4300 – Hearing Procedures.

76. **Subpart 1** directs the hearing officer to limit evidence "to that which is relevant to the issues and is not incompetent, immaterial, cumulative or relevant." MDLC noted that this standard is repeated in the evidence rule. The Department replied that it is added in this subpart to emphasize its importance and notes that this is a statutory standard. It is recommended that the phrase be modified to state: "That evidence is limited to that which is relevant to the issues and not cumulative." Relevancy is mentioned twice in the sentence and the words incompetent and immaterial are seldom used in legal proceedings any more, even though they appear in the special education statute. Also, "incompetent" may include hearsay evidence which is admissible in special education proceedings. This modification would be appropriate for this general hearing procedure subpart, while the statutory phrase is repeated in the evidence rule. Mr. Martin questioned the use of the word "unlimited" in describing the hearing officer's authority to question witnesses and request information and in response the Department decided to remove the word "unlimited." So modified, the subpart has been shown to be needed and reasonable.

77. **Subpart 2** authorizes protective orders. Mr. Martin, Rider Bennett and MDLC all recommended deletion of this provision suggesting that it was too broad and

that parties have access to school data. The Department responded by modifying the subpart to delete the reference to Chapter 13 which only regulates government data. As modified the subpart would state:

> When a party is asked to reveal data that the opposing party is not privileged to see, the party from whom the data is requested may bring the matter to the attention of the hearing officer who will review the data *in camera* and make such protective orders that are reasonable and necessary or as otherwise provided by law.

There is no specific justification in the SONAR for protective orders and the Department states only that it is intending to provide a common sense approach to securing data on an individual that is classified as not public. The comments indicate however that there is no circumstance in which disclosure of not-public data has become an issue in a due process hearing. School records are private data but both the parent and the school district are ordinarily privileged to see these records. The hearing officer has no express authority to order discovery and school districts are concerned that a protective order could be misconstrued to obtain not public information about school personnel or other students. Since the Department has failed to make an affirmative presentation of facts showing why this rule is needed, subpart 2 must be deleted.

78. **Subpart 3** requires parties to comply with hearing officer orders. In part it provides that "if a party objects to an order the objection must be stated in advance of the order as part of the record." Mr. Martin and MDLC thought the language was confusing and suggested deletion or a statement that "objections to these orders must be noted as promptly as possible."[43] The Department replied that read as a whole the subpart was not ambiguous. The language is confusing, especially to an unrepresented party, as it is not immediately apparent how a party objects to an order that is not yet issued. To avoid confusion, it is recommended that the last two sentences be modified to state: "Objections to orders must be made as part of the record as promptly as possible." The subpart is, however, needed and reasonable as proposed.

79. **Subpart 5** requires communications pertaining to a hearing to be directed to the attorney for a represented party. Rider Bennett suggested deletion of this language because schools and parents need to communicate. Mr. Martin suggested that the communications be limited to those pertaining to the subject matter of the hearing. The Department states that the provision simply states the usual rule of professional conduct for attorneys of which non-attorneys might not be aware. The subpart is needed and reasonable as proposed. It states the usual rule of conduct. The Department should consider whether Mr. Martin's suggestion might further clarify the requirement.

80. **Subpart 7** authorizes participation by non-parties in a hearing upon approval of the hearing officer. Mr. Martin and Rider Bennett saw this provision as unnecessary and urged its deletion. MDLC did not believe there was any authority for this rule. The Department argued that this provision allows for expert testimony and testimony of other non-parties such as service providers. It suggests that non-parties

may occasionally be needed, for example, if a party is improperly named in the complaint or excluded when that party should have been named. As MDLC pointed out, however, if a non-party is named in a complaint it is a party. As a commenter noted, special education due process hearings focus solely on the interests of the student and the school district and are open to the public only if the parents agree. The Department has offered no rationale to support subpart 7. In order to correct this defect it must be deleted.

81. **Subpart 8** provides that "At the discretion of the hearing officer, any party may be a witness and may present witnesses on the party's behalf at the hearing." Rider Bennett and MDLC argued that there is an absolute right to call witnesses and that it should not be in the discretion of the hearing officer. The Department contends that it is important to emphasize the authority of the hearing officer to control the hearing by noting his or her discretion in this subpart on witnesses. Although the Department has presented a rationale for placing discretion in the hearing officer, this provision conflicts with and suggests a limitation on the right of a party to present evidence and compel the attendance of witnesses.[44] Although the hearing officer may certainly exclude testimony on the grounds that it is irrelevant or cumulative, as phrased this subpart suggests that the hearing officer may deny a party's request to call a witness with relevant testimony. It also suggests that the hearing officer may deny a party the right to testify and therefore conflicts with federal law.[45] This defect may be corrected by deleting the phrase "at the discretion of the hearing officer." Rider Bennett suggested that the subpart indicate that parties cannot be sequestered. The usual rule in administrative proceedings is that a party is entitled to have one representative present in the hearing room when witnesses are sequestered. The language as proposed does not prevent the application of that rule and is not arbitrary. However, the Department may wish to add language which recognizes that a party representative may remain in the hearing room. The Department again agreed to strike the word "unlimited" from the last sentence of the subpart defining part of the hearing officer's authority. Except for the first sentence of the subpart, it is, as modified, needed and reasonable.

82. **Subpart 9** allows the hearing officer to require parties to submit "any or all" direct examination of witnesses and responses in writing prior to the hearing. It states that a witness's testimony must be written in his or her own words and signed by the witness. This provision attracted a good deal of criticism. Mr. Martin thought it called for attorney work product. Rider Bennett thought it defeated the right to present evidence at the hearing. MDLC thought it arbitrary and unjustified. The Center for Education Law described it as trial by affidavit, which would be unfair to unrepresented parents. The Department decided to withdraw the subpart and research the matter further.

<u>3525.4320 – Rules of Evidence.</u>

83. **Subpart 1** sets out a general rule of evidence and also states that the testimony of mediators or state provided IEP meeting facilitators is not admissible. Rider Bennett commented that IEP facilitators should testify. The Department pointed

out that the statute specifically prohibits team meeting facilitators from being subpoenaed to testify.[46] Mr. Martin thought this testimony was admissible if the parties agree. However, that only applies to mediated agreements.[47] Subpart 1 also states that a hearing officer may admit evidence offered for the purpose of impeachment even if not disclosed five days prior to the hearing. Rider Bennett expressed concern that this provision might be misused if a party deliberately withholds evidence and offers it for impeachment. Mr. Martin suggested that the rule apply to rebuttal as well as impeachment. The Department responded that the hearing officers will be able to control what is offered for impeachment and declined to add rebuttal to the rule to avoid encouraging its use, which is in the discretion of the hearing officer. The subpart has been shown to be needed and reasonable as proposed.

84. **Subpart 2** requires the hearing officer to rely on the evidence in the record only. Rider Bennett suggested specifically including motions within the language of the subpart. The subpart does not prohibit consideration of motions and rulings on motions. It is needed and reasonable as proposed.

85. **Subpart 3** allows documents to be received or incorporated by reference in the discretion of the hearing officer. Mr. Martin questioned the meaning of incorporation by reference and Rider Bennett commented that a document must be produced in order to be placed in the record. The Department replied that the provision authorizes the hearing officer to accept a document into the record when its title or other identifying information is offered. A similar provision is contained in Minn. Rule 1400.7300, subp. 3. It is needed and reasonable.

3525.4350 – Consolidation of Cases.

86. This rule allows a hearing officer to consolidate two or more separate cases for hearing if the cases present substantially the same issues of fact and law and consolidation would not prejudice any party. Mr. Martin and Rider Bennett objected to the rule and suggested it might amount to a mini class action. MASE commented that this idea was not discussed by stakeholders and that individual decision-making is contemplated by IDEA. The Department replied that consolidation occurs, although infrequently, and the rule sets out a framework to protect both parties. The rule has been shown to be needed and reasonable as proposed. A party objecting to consolidation need only establish different issues of fact or law or prejudice. Although rarely employed, consolidation sometimes makes sense and is agreed to by both parties.

3525.4420 – Decisions of Hearing Officer

87. This rule provides in part that "the date of the final decision or order is the date the hearing is concluded." Two commenters pointed out that this is contrary to normal practice in which the hearing is concluded and the final written decision follows. The Department agreed to modify the sentence to state: "The hearing officer's decision is final on the date the decision is issued." Mr. Martin also objected to the use of the phrase "consent decree" in the rule on the grounds that this was a specific type of court

order. The Department agreed to change the phrase "consent decree" to "consent order." So modified this rule is needed and reasonable.[48]

3525.4700 – Enforcement and Appeals.

88. This rule provides in part that the Department may seek clarification regarding an order from the hearing officer. Mr. Martin stated that if this is done the parties should be advised and allowed to comment. Rider Bennett felt this provision exceeded the Department's authority. The Department decided to withdraw the phrase "with or without a complaint and may seek clarification regarding the order from the hearing officer." Responding to comments, the Department also changed the Commissioner's authority to impose sanctions from "shall" to "may" and modified the language pertaining to review to federal court by deleting the 60 day period, as it has previously. So modified the proposed rule has been shown to be needed and reasonable. The changes are not substantial.

3525.4770 – Expedited Hearings, Timelines.

89. Rider Bennett argued that parents should be required to provide the name of the school district in **Subpart 1D**. The Department saw this as unnecessary especially since parents may not be specifically aware what the district of residence is or what is the providing district. Rider Bennett also expressed a concern about parents failing to specify that they wanted an expedited hearing. The Department responded that this a problem created by federal law and believes the district is responsible to seek clarification from the parents if they complain about an issue that can properly be heard in the expedited procedure. Subpart 1 is needed and reasonable as proposed.

90. **Subpart 6** sets out prehearing conference procedure for the expedited process. Rider Bennett suggested that rendering a written decision within 10 calendar days is unrealistic and argued in favor of a 20-business day requirement. The Department replied that the statute requires the 10-day time line.[49] The Department agreed to amend the sentence in question to track the statutory language which states that a written decision must be issued within "10 calendar days for the date the hearing is requested." The subpart has been shown to be needed and reasonable as proposed. The change is not substantial.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department of Education gave proper notice of the hearing in this matter.

2. That the Department of Education has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. That the Department of Education has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding of Fact No. 81.

4. That the Department of Education has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings of Fact Nos. 61, 77 and 80.

5. That the modifications to the proposed rules which were suggested by the Department of Education after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions Nos. 3 and 4 as noted at Findings of Fact Nos. 61, 77, 80 and 81.

7. That due to Conclusions Nos. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department of Education from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the proposed rules be adopted, except where specifically noted otherwise above.

Dated this 28th day of January 2004.

s/George A. Beck
GEORGE A. BECK
Administrative Law Judge

Reported: Taped. No transcript prepared.

NOTICE

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4, and Minn. R. 1400.2240, subp. 4, this Report has been submitted to the Chief Administrative Law Judge for his review. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects, or if the Commissioner does not elect to adopt the suggested actions, the statute requires the proposed rules be submitted to the Legislative Coordinating Commission and to the House of Representative and the Senate Policy committees with primary jurisdiction over state governmental operations for advice and comment.

If the agency chooses to follow the Chief Judge's recommended corrections and makes the suggested changes and/or others in order to cure the defects found, the agency must resubmit the rules for review by the Chief Judge. The agency may not adopt the rules until the Chief Judge reviews all changes and determines that all defects have been corrected.

If the agency chooses to submit the rules to the Legislative Coordinating Commission and the legislative committees for review, the agency must wait at least 60 days after its submission before adopting the rules.

After the rules have been adopted, the Office of Administrative Hearings will file the rules with the Secretary of State. The agency must give notice of the rules filing to all persons who requested that they be informed.

---

[1] Minn. Stat. § § 14.131 through 14.20.
[2] Ex. 1.
[3] Ex. 2.
[4] Ex. 10.
[5] Ex. 9.
[6] Ex. 5.
[7] Ex. 7.
[8] Minn. Laws 2003, Ch. 9, Article 2, Section 9 (First Special Session) codified as Minn. Stat. § 125A.091.
[9] Minn. Laws Ch. 9, Article 3, Section 19 (First Special Session).
[10] Minn. Stat. § 14.131.
[11] Ex. 4, p. 3.

[12] Ex. 4, p. 5.
[13] Minn. Stat. § 14.131.
[14] Minn. Stat. § 14.002.
[15] Ex. 4, p. 5.
[16] Ex. 4, p. 1.
[17] Ex. 8, pp. 1-2.
[18] Ex. 9.
[19] ARC of Minnesota also endorsed Mr. Granquist's hearing comments.
[20] Mammenga v. Department of Human Services, 442 N.W. 2d 786 (Minn. 1989); Manufactured Housing Institute v. Pettersen, 347 N.W. 2d 238, 244 (Minn. 1984).
[21] *In re* Hanson, 275 N.W. 2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W. 2d 281, 284 (1950).
[22] Greenhill v. Bailey, 519 F. 2d 5, 19 (8th Cir. 1975).
[23] Mammenga, 442 N.W. 2d at 789-90; Broen Memorial Home v. Department of Human Services, 364 N.W. 2d 436, 444 (Minn. Ct. app. 1985).
[24] Manufactured Housing Institute, 347 N.W. 2d at 244.
[25] Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233, 63 S. Ct. 589, 598 (1943).
[26] Minn. R. 1400.2100.
[27] Minn. Stat. § 14.15, subd. 3.
[28] Minn. Stat. § 14.05, subd. 2.
[29] Ex. 5, Ex. 9.
[30] Ex. 8.
[31] Ex. 3.
[32] The use of the word "admitted" would be clearer.
[33] Ex. 6., Ex. 8.
[34] Ex. 1.
[35] The first sentence of this item would be clearer if phrased as follows: If the proposed action is an initial evaluation or initial placement, the district must not proceed until the parents give written informed consent.
[36] A reader friendly phrasing of the proposed language would be - If the request for a due process hearing is filed directly with the department, the department must notify the district of the request within two business days.
[37] Item A could be rephrased as follows: The names and telephone numbers of any free or low-cost legal or other advocacy services available in the area and a statement that both parties have the right to be assisted by counsel… .
[38] See Findings of Fact No. 21.
[39] See Finding of Fact No. 17 and Minn. Rule pt. 1400.2100B.
[40] The due process clause of the United States Constitution entitles a person to an impartial and disinterested tribunal. Marshall v. Jerrico, 446 U.S. 238, 242 (1980). However, a combination of investigative and adjudicative functions, alone, is generally not thought to cause a due process violation. Withrow v. Larkin, 421 U.S. 35 (1975). But see, Haas v. County of San Bernadino, 45 P.3d 280 (Cal. 2002) (Hearing officer selected and paid by the county to conduct a license revocation proceeding had financial interest bias because she had an incentive to decide in favor of the county and then be selected for future cases).
[41] "a list of evidence" might more clearly be phrased as "a list of written exhibits."
[42] The rule actually uses the word "questions." "Issues" would be clearer.
[43] Ex. 8, p. 22.
[44] 34 CFR § 300.509(a)(2).
[45] See Minn. Rule pt. 1400.2100 D. Flores v. Dept. of Jobs and Training, 411 N.W. 2d 499, 504 (Minn. 1987).
[46] Minn. Stat. § 125A.091, subd. 8.
[47] Minn. Stat. § 125A.091, subd. 10.
[48] The first sentence of the rule would be clearer if it stated: The hearing officer must issue a written decision or order after the hearing and serve the decision or order on all parties.
[49] Minn. Stat. § 125A.091, subd. 19.